86-2040

No. _____

Supreme Court, U.S.
FILED
JUN 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

In the Matter of
THOMAS J. KAVANAGH
Conservator of

CARL ROHRBACH,
Conservatee.

RICHARD E. COVEN, Referee,

Appellee,

—v.—

THOMAS J. KAVANAGH, Conservator,

Appellant.

ON APPEAL FROM THE APPELLATE DIVISION OF
THE SUPREME COURT OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

THOMAS J. KAVANAGH
521 Fifth Avenue, 17th Floor
New York, New York 10017
(212) MU 7-0890
Appellant *pro se*

50 pp

QUESTIONS PRESENTED

At issue here is the constitutionality of a New York statute, The Mental Hygiene Law by which a $15,000.00 judgment was entered against a removed Conservator, without a jury trial, or any trial for opposing the Court's two consecutive attempts to deliver the life savings of the Conservatee into the hands of the son of a Genovese crime family "soldier" Albert "Al Sappo" Viggiano, known as Paul A. Victor under investigation for "mob" connections; and when he declined then said Conservatee's life savings were given to Bruno Cappellini, N.Y. County Public Administrator also under investigation for accumulating a "slush fund.

The Supreme Court of N Y, Appellate Division, First Department affirmed the aforesaid order. The questions presented on this appeal are:

1. Can a state statute, consistent with jury trial requirements of the U.S. Constitu-

tion, deny a jury trial to a litigant against whom a $15,000.00 judgment is sought?

2. Can a state statute, consistent with the due process and equal protection of law requirements of the U.S. Constitution, grant a trial when removing one Conservator, and deny a trial when removing another Conservator?

3. Can a N Y state court, consistent with the due process and equal protection of law requirements of the U.S. Constitution, ignore a statutory requirement of New York's Mental Hugiene Law in Section 77.33 stating a Petition to remove a Conservator must be heard by the appointing judge?

PARTIES TO THE PROCEEDING

The caption of the case lists parties to the proceeding. Bruno Cappellini did not perfect his appointment as substitute Conservator before the Conservatee died on November 20,1986 but has and will receive copies of all papers pertinent to this appeal, as will Hendler and Murray, P.C. the attorneys for American Insurance Company, the surety on Conservator-Appelant's bond.

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SUPREME COURT OF THE UNITED STATES

October Term 1987

In the Matter of
THOMAS J. KAVANAGH
Conservator of

CARL ROHRBACH,
Conservatee

RICHARD E. COVEN, Referee,
Appellee,

-v-

THOMAS J. KAVANAGH, Conservator,
Appellant.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Order appealed from of the Supreme Court of the State of N Y, Appellate Division, signed on March 19,1987, affirming the removal of Conservator-appellant was made without opinion (1A).

The only opinion rendered was by the Supreme Court of N Y, County of N Y, Special Term I, on September 13,1985 (16A). The Order of said Supreme Court, N Y County removing Conservator-appellant was entered October 6,1986 (3A).

JURISDICTION

Appellant-conservator Thomas J.Kavanagh appeals from a final order of the Supreme Court of N Y, Appellate Division, First Department, signed March 19,1987 affirming, without opinion, the Order of the Supreme Court of N Y, N Y County, Special Term I entered October 6,1986 replacing Appellant as Conservator of Carl Rohrbach's property, and ordering appellant to pay $15,000.00 to Appellee as the costs of opposing the appointment of Bruno Cappellini, and denying Appellant's motion for a jury trial before the Judge who appointed appellant Conservator.

As orders entered on a Referee's report are not appealable in this State beyond the

Appellate Division of the Supreme Court of N Y a Notice of Appeal was timely filed on April 23, 1987 with the Court possessed of the record in this case (Supreme Court, N Y County) and on April 23,1987 a copy of said Notice of Appeal was filed with the Court from whose Order this appeal is taken (Appellate Division, First Department).

This appeal is being docketed in the Court within 90 days of the Order of the Appellate Division, First Department, below. The jurisdiction of the Court is invoked under 28 U.S.C Sec 1257 (2).

CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED

This case involves the U.S. Constitution's VII Amendment which preserves the right to trial by jury where the amount in controversy exceeds twenty dollars; and Section 1 of the U.S.Constitution's XIV Amendment which prohibits the states from making any

law which deprives any person of their property without due process of law, or which denies any person equal protection of the laws. Also involved is a N Y Statute, Section 77.33 of the Mental Hygiene Law requiring that removal petitions to replace a Conservator must be made to the appointing judge.

STATEMENT OF THE CASE

1. The Parties. Appellant was freely chosen by Rohrbach to be his Conservator, if ever needed, on July 24,1979. Appellant served without fee or commission--and by defeating four different claims against the Conservatee's estate saved it $27,000.00--and filed a final account in December 1986 showing a balance of $45,000.00. The Appellee, an official referee of the said Appellate Division first heard of Rohrbach when an Appellate Division colleague,ex-Law Secretary, John J.Lamendola demanded Appellant's removal as

Conservator on the pretext that Appellant's marriage to one Christina Reedman, who had a unasserted claim for services to Conservatee, constituted a disqualifying conflict of interest. Lamendola swears he first heard of Rohrbach when he was helping his crony, the Principal Law Assistant at said tribunal, Robert P. McGreevy to "grab" a $675,000.00 building from aged Anna Richter, an old acquaintace of Appellant. Lamendola and McGreevy's "grab" was spoiled by Appellant who obtained the appointment of a Guardian ad Litem to protect her interests. Appellant's removal and replacement,on Lamendola's demand, by first the Mafia's lawyer, Victor, and next by Bruno "slush-fund" Cappellini after two respectable lawyers,Harry Grossman and "The" (renowned) Harry Lipsig,refused to administer the punishment to Conservator for McGreevy and Lamendola in retaliation for spoiling

their "grab".

2. The Mental Hygiene Law. The removal proceeding was brought on before Judge Arthur E. Blyn who was not the appointing judge. Appellant moved to refer it to the appointing Judge Martin Evans, to be tried there by a jury. Judge Blyn refused to refer it to Judge Evans, and usurped said appointing Judge's prerogative to hear any petition to remove his appointee. This procedure is mandated by the Mental Hygiene Law, Section 77.33 (30A) as was demonstrated in the removal proceeding against John Zaccaro the Conservator who converted $175,000.00 of Conservatee Alice Phelan's money to his private use, and was given a trial in open court before the appointing Judge Edwin Kassoff. See "Matter of John Zaccaro, Conservator of Alice Phelan, Conservatee Supreme Court of N Y, Queens County Index 17169-1982. If Zaccaro who converted $175,000.00

to his own use got a trial in open Court, as required by N Y's Mental Hygiene Law under Section 77.33 thereof, and was not ordered to pay $15,000.00 as Appellant was ordered to do without any trial then Appellant did not receive equal protection of law. Appellant's rights to due process and equal protection of law were violated by not granting his motion for a jury trial before the Judge who appointed him.

THE QUESTIONS ARE SUBSTANTIAL AND OF IMPERATIVE PUBLIC IMPORTANCE

Conservatorship proceedings have grown to immense proportions in N Y State and affect the most fundamental rights guaranted by the U.S.Constitution, viz the rights to be secure in the enjoyment of personal liberty and the possession of property.

If the Order appealed from is not reversed and this proceeding is not remanded to the N Y Supreme Court for a jury trial,

before Justice Martin Evans the appointing Judge as required by N Y'S Mental Hygiene Law, Section 77.33 to determine if the Conservator-appellant's opposition to the appointments of a Mafia lawyer and a "slush fund" accumulating official as custodian of Conservatee's life savings was reasonable--in which case it would be unjust to order him to pay $15,000.00 to Appellee, who helped bring the Mafia into the Conservatee's life --or, on the other hand, to allow the jury to vote their approval of such appointments and confirm the $15,000.00 penalty levied against Conservator-appellant as his just punishment for resisting such appointments, then this case will stand as a precedent at the highest level, which can be cited by any venturesome predator, including those with "mob" connections who see easy profits by intrusion into the lives of helpless Con-

servatees to show that the jury trial, due process and equal protection of law have no application in Conservatorship removal proceedings. And that the following cases no longer are reliable authority:

> Due process of law has not been defined but is "fundamental fairness" Bagley v Bagley 292 NY Supp 2nd 796 In re Coates 368 U S 34; Missouri v Gehmer 281 U S 313; Saunders v Shaw 244 U S 317.

> "Violation of equal protection of law can be brought about by an unequal and discriminatory administration of a statute which is fair and legal on its face" Poindexter v Greenhow 114 U S 27; Yick Wo v Hopkins 118 U S 356; U S v Reynolds 235 U S 133.

> "Equal protection means all persons subjcet to a particular legislative act shall be treared alike

as to privilege conferred
and in liabilities imposed."
Tyler v Eastern Discount
Corp 286 N Y Supp 2d 948;
Fenster v Leary 20 N Y 2nd
309; Peo v Citmiak 299 N Y
Supp 2nd 593; Peo v Tromtore
261 N Y Supp 2nd 474.

CONCLUSION

For the foregoing reasons the Order below hould be reversed and the removal proceeding should be remanded to N Y State's Supreme Court, N Y County for a jury trial of all issues before Justice Martin Evans, the appointing Judge.

Respectfully submitted

THOMAS J. KAVANAGH
Conservator-appellant, pro se
521 5th Avenue 17th Fl
New York, N Y 10017
212-MU 7-0890

Appendix A

Order of the Supreme Court
Appellate Division, First
Department, March 19,1987

At a term of the Appellate
Division of the Supreme
Court held in and for the
First Judicial Department
in the County of New York,
on March 19,1987

Present- Hon Joseph P.Sullivan, Justice Presiding
Sidney H.Asch
E.Leo Milonas
Bentley Kassal Justices

In the Matter of Thomas J.Kavanagh,Conservator of Carl Rohrbach,Conservatee.

Richard E. Coven, Referee, 29515N
Petitioner-Respondent M-599

-v-

Thomas J. Kavanagh, Conservator
Respondent-Appellant

An appeal having been taken to this Court by the respondent-appellant from a resettled order of the Supreme Court, New York County (Arthur Blyn,J.) entered on Oct-

ober 6,1986,

And said appeal having been argued by Thomas J. Kavanagh, appellant pro se; and due deliberation having been had thereon,

It is unanimously ordered that the resettled order so appealed from be and the the same hereby is affirmed. Petitioner-respondent shall recover of appellant $50 costs and disbursements of the appeal. Motion by petitioner respondent for an order dismissing the appeal, and for other relief denied.

ENTER,
JOHN REYNOLDS
Clerk

Appendix B

Crder of the Supreme Court N Y County, Spec I, October 6, 1986

At a Special Term, Part I of the Supreme Court, held in and for the County of N Y, at the Courthouse, 60 Centre Street, N Y, N Y on the 29th day of September, 1986

Present:
Hon. Arthur J. Blyn
Justice

- - - - - - - - - - - - - - - - - - -X

In the Matter of
THOMAS J. KAVANAGH
Conser ator of
CARL ROHRBACH,
Conservatee

Index 90123-80

Resettled Order

- - - - - - - - - - - - - - - - - - -X

Upon the annexed affidavit of Bruno Cappellini P A of the County of N Y, sworn to September 10, 1986 and Notice of Settlement of such order as resettled having been given to Thomas J. Kavanagh, Esq. Conservator, pro se; Richard E. Coven, Esq., Referee Petitioner; American Insurance Co.; Citibank, N.A.; and Manhattan Savings Bank;

NOW, on Motion of Joseph T. Arenson,Esq. attorney for the P.A. of the County of N Y, it is hereby

ORDERED, that the Order of this Court dated January 6,1986, and entered January 14, 1986, be and the same hereby is resettled to read as follows:

At a Special Term,Part I of the Supreme Court,held in and for the County of N Y,at the Courthouse,60 Centre Street, N Y, N Y on the 6th day of January ,1986

Present:
Hon. Arthur J. Blyn
Justice

- - - - - - - - - - - - - - - - - - -X

In the Matter of

THOMAS J. KAVANAGH
Conser ator of

CARL ROHRBACH,
Conservatee

Index
90123-80

ORDER REMOVING CONSERVATOR

- - - - - - - - - - - - - - - - - - -X

Upon reading and filing the order to show

cause of Justice Jawn A. Sandifer, dated March 7, 1983, the petition of Richard E.Coven, Referee duly appointed pursuant to Sections 77.29, 78.25, and 79.17 of the Mental Hygiene Law to examine accounts filed by conservators, committees and guardians of incompetent persons, verified the 3rd day of March, 1983, the affidavit of Mirchell S. Coven, sworn to the 7th day of March 1983, showing due service of said order and petition upon the persons, in the manner and at the time directed by said order, the answer of Thomas J.Kavanagh, the Conservator herein, dated and verified March 18,1983, the cross-petition of said Thomas J. Kavanagh dated and verified March 18,1983, the memorandum decision and order of this Court dated April 20,1983 which inter alia reserved de-

cision on the application to remove the Conservator pending further notice by said Referee of the results of his examination of Conservator's accounts and denied said cross-petition, as modified by the order of this Court dated April 2 ,1983 the Conservator's notice of motion dated September 23,1983 for leave to serve a supplemental answer herein, the affirmation of Thomas J. Kavanagh, dated September 23, 1983 in support of said motion, the affidavit of Richard E. Coven sworn to September 10,1983, in opposition to said motion, the reply affirmation of Thomas J. Kavanagh,dated October 4,1983, the order of this Court dated November 23,1983 denying said motion of the Conservator,the Conservator's undated notice of motion returnable December 14,1984 for an order, inter alia, directing the issues be tried by a jury, the affirmation of Thomas

J.Kavanagh,dated December 4,1984 in support of said motion, the affidavit of Richard E. Coven, sworn on December 7,1984, in opposition to said motion, the reply affirmation of Thomas J. Kavanagh dated December 13,1984 the decision and order of this Court dated May 10, 1983 denying said motion of the Conservator, the notice of motion dated June 7, 1985 renewing the motion to remove the Conservator, the affidavit of Richard E.Coven sworn to June 7, 1985 and the Report of Richard E. Coven as such Referee dated June 7, 1985 in support of such motion, the affirmation of Thomas J.Kavanagh dated June 17, 1985 in opposition to such motion, the Conservator's notice of motion dated June 17, 1985 for leave to reargue and/or renew his previously denied motion seeking among other relief a jury trial, the affirmation of Thomas J. Kavanagh dated June 17, 1985 in

support of such motion, the affidavit of Richard E. Coven sworn to June 20,1985, replying upon the motion to remove the Conservator and in opposition to the Conservator's motion to reargue or renew, the reply affirmation of Thomas J. Kavanagh dated June 26,1985 and the affidavit of services of Richard E.Coven, sworn to the 26th day of September, 1985, and after hearing Richard E. Coven, Esq in support of the motion to remove the Conservator, and Thomas J. Kavanagh, Esq., in opposition thereto, and due deliberation having been had thereon and this Court having rendered its written decision and order dated September 13, 1985 and it appearing to the satisfaction of the Court that grounds exist for the removal of Thomas J. avanagh, as Conservator of the property of Carl Rohrbach, the Conservatee herein,

NOW, on motion of Richard E. Coven,Esq. it is hereby

ORDERED, that the motion to remove Conservator and for other relief be and the same hereby is granted; and it is further

ORDERED, that Thomas J. Kavanagh be and he hereby is removed as Conservator of the property of Carl Rohrbach, the above named Conservatee; and it is further

ORDERED, thag pursuant to the rules of the Appellate Division, First Department, the Public Administrator of the County of New York be and hereby is appointed substitute Conservator of the property of the said Carl Rohrbach, with the usual powers incidental thereto as provided by law, conditioned that he will in all things, faithfully discharge the trust imposed upon him and obey all the directions of the Court in regard to the trust, and will make and render a just and true account of all the monies or other property received by him and

the application thereof, and of his acts in the administration of his trust, whenever so required to do so by the Court, and upon filing with the Clerk of the Court a consent duly executed and acknowledged and the designation required by Section 77.17 of the Mental Hygiene Law; and it is further

ORDERED, that a commission may be issued to the said substitute Conservator under the seal of this Court upon filing the consent and the designation required by statute in the office of the Clerk of this County; and it is further

ORDERED, that all of the income and assets of the Conservatee shall continue under said substitute conservatorship and it is further

ORDERED, that the compensation of the substitute Conservator shall be the same as provided in Section 78.21 of the Mental Hy-

giene Law; and it is further

ORDERED that upon the said Public Administrator of the County of New York, duly qualifying as aforesaid as substitute Conservator of the property of Carl Rohrbach, theabove named Conservatee, the said removed Conservator, Thomas J. Kavanagh, pay and turn over to said substitute Conservator all monies and other property remaining in his hands or under his control belonging to the said Conservatee; and it is further

ORDERED, that all persons be and hereby are directed and commanded to deliver to the said substitute Conservator, upon demand and presentation of a certified copy of said commission all property and income of said Conservatee, of every kind and nature which may be in their possession or under their control; and it is further

ORDERED, that the substitute Conservator, upon qualifying as such, be and hereby is directed to investigate the so-called "Reedman transactions" referred to in the decision of this Court dated September 13, 1985 and the Report of Referee Richard E. Coven dated June 7,1985 and, if deemed appropriate,commence legal action to recover the monies paid by the Conservatee; and it is further

ORDERED, that said removed Conservator, Thomas J. Kavanagh, be and hereby is directed to make and file the final account as to all monies and other property of the said Carl Rohrbach, Conservatee, received by him as Conservator of the property of said Carl Rohrbach, in the office of the Clerk of this Court and move to have said account judicially settled, within 30 days of service upon him of a copy of this order with notice of

entry hereof; and it is further

ORDERED, that the said Thomas J.Kavanagh be and hereby is charged with and directed to pay personally the compensation of Richard E. Coven, the petitioner in this proceeding, for the prosecution of this proceeding; and it is further

ORDERED, that the sum of Fifteen Hunddred Dollars ($15,000.00) be and hereby is fixed and awarded to said Richard E.Coven as his reasonable compensation for the prosecution of this proceeding and the said Thomas J. Kavanagh be and hereby is directed to personally pay such sum to said Richard E.Coven out of his own funds and not out of the funds held by him and belonging to the Conservatee; and it is further

ORDERED, that Citibank, N.A. be and hereby is enjoined and restrained from pay-

ing out and or disbursing any of the funds of the said Conservatee, Carl Rohrbach, in account No 030-3311295, or in any account into which said funds have been transferred or in any other account,upon the orders or instructions of Thomas J.Kavanagh; and it is further

ORDERED, that Manhattan Savings Bank be and it hereby is enjoined and restrained from paying out or disbursing any of the funds of the said Conservatee Carl Rohrbach in accounts Nos 2-9045438, 28172163 or 1120-71647, or in any account intowhich said funds have been transferred, or in any other account, upon the orders or instructions of Thomas J. Kavanagh; and it is further

ORDERED, that personal service of certified vopies of this Order upon Citibank, N. A. at 450 W 33rd Street, 6th Floor, N Y 10041, and upon Manhattan Savings Bank at

385 Madison Avenue, N Y 10017 be deemed good and sufficient service hereof; and it is further

ORDERED , that the Conservator's motion for reargument and or renewal of this Court' prior decision of May 10,1985 denying his motion for a jury trial and other relief be and the same hereby isdenied in all respects.

ENTER

A.E.B.

J.S.C.

Filed
Octoober 6,1985
County Clerk's Office
New York

Appendix C

Opinion of the Supreme Court, State of N Y, Special Term I, Sept 13,1985

SUPREME COURT, NY COUNTY
SPECIAL TERM PART I - - - - - -X

In the Matter of

THOMAS J.KAVANAGH
Conservator of

CARL ROHRBACH
Conservatee

Index No
90123-80
#184 6/25/85
#199 6/27/85

- - - - - - - - - - - - - - - - -X

BLYN, J.:

Motions under calendar number 184 of 6/25/85 and 199 of 6/27/85 are consolidated for disposition.

Under motion 184 Referee Richard E. Coven moves for an order removing Thomas J. Kavanagh as conservator of the property of Carl Rohrbach. The Referee originally moved to remove the conservator in March 1983; by decision dated 4/20/83, the removal application was held in abeyance pending examination of the conservator's accounts

The Referee has now completed his examination of said accounts, and his report thereon is submitted in support of the instant renewal of the motion to remove Kavanagh as conservator.

The court finds much cause for concern in the Referee's report. Initially, the court notes that none of the conservator's accounts has been timely filed under the Mental Hygiene Law since his appointment in 1981. This consistent tardiness does a disservice to the estate and the court, and makes a proper examination of the accounts more difficult.

It appears that the estate may have a viable claim against one Christina Reedman concerning the sum of $11,000.00 which was given to her in 1980 by the conservatee just prior to the commencement of the proceedings

leading to the appointment of a conservator. Ms Reedman contends that most of the money was spent--as the conservatee intended -- to hir an attorney to oppose the petition for appointment of a conservator; she concedes that the sum of $4,000 remains out the original $11,000.00. The Referee recommends that the Reedman transactions should be investigated, and if deemed appropriate, legal action commenced to recover the monies paid over by the conservatee.

Ms Reedman, however, is the wife of the conservator (she married Kavanagh in May 1981). Obviously, a conflict of interest exists which would prevent the conservator from properly representing the estate in any proceeding taken against Ms Reedman, his wife.

In light of the foregoing, the court believes that the interests of the conservatee will best be served if Kavanagh is removed

as conservator and a substitute conservator appointed by the Appellate Division, First Department. The Referee's motion (no 184) is therefore granted.

The conservator's motion (no 199) for reargument and renewal of this court's prior decision denying him the right to a jury trial, is denied. No basis whatever has been established for reargument or renewal of the court's decision.

The conservator is directed to file his final account within 30 days of service of a copy of the order to be settled hereon with notice of entry. Settle order, providing for the appointment of a successor conservator to be designated pursuant to the rules of the Appellate Division, First Department.

This decision shall constitute the order of the court.

A.E.B
J.S.C

Dated: Sept 13,1985

Appendix D

Notice of Appeal to
the Supreme Court of
the State of N Y 10/27/86

SUPREME COURT, STATE OF NY
NY COUNTY, APPELLATE DIV-
ISION, FIRST DEPT
- - - - - - - - - - - - - - - - -X

In the Matter of
THOMAS J.KAVANAGH
Conservator of
CARL ROHRBACH,
Conservatee

Index
90123-80
NOTICE OF
APPEAL

RICHARD E.COVEN, Referee
Petitioner-
Respondent

-v-

THOMAS J.KAVANAGH, Conservator
Respondent-
Appellant
- - - - - - - - - - - - - - - - - X

PLEASE TAKE NOTICE that respondent Thomas J.Kavanagh hereby appeals to the Appellate Division of the Supreme Court for the 1st Dept. from an order of Hon. Arthur E. Blyn, Justice dated 1/6/86 and filed 1/14/86, removing Conservator and replacing him by the son of a Genovese

crime family "soldier", Albert "Al Sappo" Viggiano, known as Paul A. Victor undergoing a Federal Grand Jury probe for "mob" connections with a group in the Bronx who "walk around carrying bags of loot"; and modified by a further order of Justice Blyn of 4/24/86 appointing "The" Harry Lipsig as substitute Conservator in place of Conservator Kavanagh and modified by a further order of 6/22/86 appointing Bruno Cappellini, Public Administrator of N Y County who is undergoing an investigation by the Comptroller of N Y State and the Attorney General of N Y State for corruptly accumulating a $100,000.00 "slush fund" and paying $2,000,000 yearly to "political appointees"; and on motion of Joseph T. Arenson, attorney for Bruno Cappellini resettled by Justice Blyn's order of 9/29/86, filed 10/6/86 granting Referee-petitioner's motion to remove Conservator-respondent Kav-

anagh and substitute in his place said Bruno Cappellini and directing said Conservator-respondent to pay out-of-his-pocket $15,000.00 to said Referee-petitioner as a "reasonable" legal fee for services rendered in removing said Conservator-respondent, and in opposing Conservator-respondent's motion of June 17, 1985 to reargue/renew Conservator-respondent's motion, returnable 12/14/84 to have a jury trial and to refer said removal proceeding to Justice Martin Evans who appointed Conservator Kavanagh, as required by Sec. 77.33 of the Mental Hygiene Law, and to challenge by said jury trial said award of $15,000 as well as surcharges of $4,258.00 sought to be imposed on Conservator by Referee-petitioner by means of an ex parte order, dated 6/7/85 of Special Referee Gamso, made without notice to Conservator, and placed in issue before Justice Blyn by inclusion in Ref-

eree-petitoner's affirmation of 6/20/85 in support of his removal motion; and to also challenge by jury trial an award included in said Special Referee Gamso's ex parte order of 6/7/85 of $1,858.75 for legal fees and disbursements payable to said Referee-petitioner Coven, to be paid by Carl Rohrbach, for services examining Conservator's accounts, while said Referee-petitioner Coven was contemporaneously and covertly helping Ft Tryon Nursing Home to take a $23000.00 default summary judgment (later vacated) against the funds of Conservatee Carl Rohrbach, which funds he was sworn to preserve; and this appeal is taken from each and every part of the whole thereof.

Dated: NY NY
10/30/86

Yours, etc

THOMAS J. KAVANAGH
Conservator-Appellant
appearing pro se
521 5th Ave. 17th Fl
NY NY 10017

To: Richard E. Coven
Referee-petitioner
respondent, pro se
535 5th Avenue
NY NY 10017

Appendix E

Notice of Appeal to the Supreme Court of N Y, Appellate Division, 1st Department 4/17/87

SUPREME COURT, NY STATE,
NY COUNTY, APPELLATE DIV-
ISION 1st DEPT.

- - - - - - - - - - - - - - - - -X

In the Matter of
THOMAS J. KAVANAGH
Conservator of

CARL ROHRBACH
Conservatee

Index No
90123-80

NOTICE OF
APPEAL

A.D.
29515N
M-599

RICHARD E. COVEN, Referee

Petitioner-
Respondent

-v-

THOMAS J. KAVANAGH, Conservator

Respondent-
Appellant

- - - - - - - - - - - - - - - - -X

PLEASE TAKE NOTICE, THAT Appellant T. J.Kavanagh hereby appeals to the Supreme Court of the United States from a final order of the Supreme Court of N Y, Appellate Division, 1st Dept., which is the Court of last resort on appeals from orders and judgments entered on Referee's

reports, dated 3/19/87 and filed in the Office of the Clerk of said Appellate Division affirming an order of Justice Blyn of the Supreme Court of N Y, 1st Dept. dated 1/8/86 and filed the N Y County Clerk's office on 1/14/86, removing Conservator Kavanagh and replacing him by the son of a Genovese crime family "soldier", Albert "Al Sappo" Viggiano known as Paul A.Victor undergoing a Federal Grand jury probe for "mob" connections with a group in the Bronx who "walk around carrying bags of "loot"; and modified by J.Blyn's order of 4/24/86 appointing (when Victor declined) "The" Harry Lipsig as substitute Conservator for Conservator Kavanagh, and modified Judge Blyn's order of 6/22/86 appointing (when Lipsig declined) Bruno Cappellini, P.A. of N Y County, under-

going an investigation by the Comptroller of N Y State and the Attorney General of N Y for corruptly accumulating a "slush fund" of $100,000.00 and paying $2,000,000 yearly to "political appointees"; and said order of 6/22/86 was, on motion of Joseph T.Arenson, attorney for Bruno Cappellini resettled by said Justice Blyn of Sept 29, 1986 filed in the N Y County Clerk's office on 10/6/86 granting said Referee-petitioner's motion, based on said Referee-petitioner's report of 6/7/85,to remove Conservator Kavanagh and substitute in his place Bruno Cappellini, and directing said Conservator-respondent to pay out-of-his-pocket $15,000.00 to said Referee-petitioner as a reasonable legal fee for services rendered in removing said Conservator-respondent, and in opposing Con-

servator-respondent's motion of 6/17/85 to reargue/renew Conservator's motion returnable 12/14/86 to have a jury trial and to refer said removal proceeding to Justice Martin Evans who appoint Conservator Kavanagh, as required by Sec. 77.33 of the Mental Hygiene Law, and to challenge by said jury trial requested said award of $15,000 as well as surcharges of $4,258.00 sought to be imposed on Conservator-respondent by Referee-petitioner by means of an ex parte order, dated 6/7/85 of Special Referee Gamso, made without notice to Conservator, and placed in issue before said Justice Blyn by inclusion in said Referee's affirmation of 6/20/85 in support of his removal motion; and to also challenge by said jury trial requested an award included in Special Referee Gamso's order of 6/7/85 of $1,858.75 for legal fees and disbursements payable to Referee-pet-

itioner Richard E. Coven, to be paid by Carl Rohrbach, for services rendered in examining said Conservator's accounts, while said Referee-petitioner Coven was contemporaneously and covertly helping Ft Tryon Nursing Home to take a $23,000.00 default Summary Judgment (later vacated) against the funds of Conservatee Carl Rohrbach, which funds he, as a Referee, was sworn to preserve; and this appeal is taken from each and every part of said order of 3/19/87 except its denial of Referee-respondent's motion to dismiss appeal.

Dated: NY NY
4/17/87

Yours, etc
Thomas J.Kavanagh
Conservator-Appellant
appearing pro se
521 5th Ave 17th Fl
NY NY 10017

TO: Richard E. Coven
Referee-Petitioner-
Respondent
535 5th Avenue
NY NY 10017

Appendix F

Mental Hygiene Law Section 77.33

REMOVAL OF A CONSERVATOR.

The Court appointing a conservator may remove him when he fails to comply with an order, is guilty of misconduct, or for any other cause which to the Court shall appear just.

Appendix G

VII Amendment of the U.S. Constitution

In suits at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Appendix H

XIV Amendment of the U.S.Constitution

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the u.S.; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurissdiction the equal protection of of the laws

86 No. 2040

Supreme Court, U.S.
FILED
JUL 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

In the Matter of
THOMAS J. KAVANAGH,
Conservator of

CARL ROHRBACH,
Conservatee.

RICHARD E. COVEN, Referee, -
Appellee,

v.

THOMAS J. KAVANAGH, Conservator,
Appellant.

On Appeal From the Appellate Division of The Supreme Court of the State of New York

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APPELLEE'S MOTION TO DISMISS APPEAL FROM STATE COURT

RICHARD E. COVEN
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TABLE OF AUTHORITIES

(New York State Statutes, unless otherwise indicated)

Section 77.33, Mental Hygiene Law	3, 5, 6, 7
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28 United States Code, Section 1257 (2)	4, 6
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October, 1986 Term

In the Matter of
THOMAS J. KAVANAGH,
Conservator of

CARL ROHRBACH,
Conservatee.

RICHARD E. COVEN, Referee,
Appellee,

-v.-

THOMAS J. KAVANAGH, Conservator,
Appellant.

On Appeal From the Appellate Division of
The Supreme Court of the State of New York

MOTION TO DISMISS APPEAL

INTRODUCTION

Appellee in the above entitled case, pursuant to Rule 16 of the Rules of this Court, respectfully moves to dismiss the appeal on the following grounds:

1. This case is not within the appeal

jurisdiction of this Court.

2. The alleged Federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on by the courts of New York.

3. The appeal fails to present a substantial Federal question.

4. Appellant's jurisdictional statement does not comply with Rule 15 and Rule 28.4(c) of the Rules of this Court.

STATEMENT

This is an appeal from an order dated March 19, 1987 of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, unanimously affirming, without opinion, an order of the Supreme Court, County of New York, entered on October 6, 1986, which inter alia removed the Appellant as Conservator of the Property of Carl Rohrbach (who thereafter died on November 20, 1986).

Appellant was appointed Conservator by order

of the Supreme Court, New York County, dated May 11, 1981. By petition dated March 3, 1983 of Appellee, as Referee appointed by the Court to examine annual accounts filed by Conservators, a proceeding was commenced pursuant to Section 77.33 of the Mental Hygiene Law of the State of New York to remove Appellant as Conservator. The proceeding culminated in the order entered October 6, 1986 removing Appellant as Conservator due to a conflict of interest (decision dated September 13, 1985, p. 18A, Appellant's Jurisdictional Statement). The affirmance of such order by the Appellate Division is the subject of the present appeal.

Appellant did not appeal the order of the Appellate Division to the Court of Appeals of the State of New York (the highest Court of the State) or seek leave to appeal to the Court of Appeals from such affirmance (although Appellant had earlier moved in the Court of Appeals for permission to appeal from an order of the Appellate Division dated December 4, 1986 denying Appellant's motion for a stay pending the appeal in the Appel-

late Division, such motion having been dismissed by order of the Court of Appeals dated January 20, 1987).

It may be noted that while the appeal was pending in the Appellate Division, Appellant also applied to this Court for a stay pending such appeal and, under number A-626, such application was denied by Justice Marshall on February 27, 1987 and upon re-submission by Appellant to Justice O'Connor and referral to the Court was again denied on March 23, 1987.

ARGUMENT

I. This Case is Not Within the Appeal Jurisdiction of This Court

Appellant in his jurisdictional statement invokes the jurisdiction of this Court under 28 U.S.C., Section 1257 (2) which deals with review by this Court of final judgments or decrees rendered by "the highest court of a State in which a decision could be had".

As noted above, Appellant did not appeal the Appellate Division's order of affirmance to the Court of

Appeals or seek leave to appeal to that Court, but simply served a notice of appeal to this Court incorrectly stating that the Appellate Division "is the Court of last resort on appeals from orders and judgments entered on Referee's reports" (p. 25A). Similarly, Appellant's jurisdictional statement states that "orders entered on a Referee's report are not appealable in this State beyond the Appellate Division***" (p. 3).

Even if Appellant's statements in this respect were correct, the order appealed from was not entered on the Referee's report and the appeal in the Appellate Division was not from an order entered on the Referee's report. The order was in fact entered on the petition to remove the Appellant as Conservator in a special proceeding brought pursuant to Section 77.33 of the Mental Hygiene Law of the State of New York. Thus, the highest court of the State of New York in which a decision could be had in this case was the Court of Appeals, to which no appeal was taken. Appellant's appeal is from an intermediate appellate court of the state and, thus, there is no

jurisdiction in this Court under 28 U.S.C. Section 1257 (2), or any other statute.

II. The Failure to Raise Federal Constitutional Questions in the State Courts

The validity of the state statute (Section 77.33 of the Mental Hygiene Law) involved was never challenged, raised or passed upon prior to the entry of the order in the Supreme Court or even on the appeal therefrom. The opinion of the Court of original jurisdiction (p. 16A, Jurisdictional Statement) does not mention, discuss or pass on any Federal constitutional questions. Appellant's brief on the appeal in the Appellate Division presented four questions, being as follows:

1. Can a litigant be denied a jury trial in contest (sic.) where the sum of $15,000.00 is sought in the form of a judgment?

2. Can a litigant be denied any kind of a hearing in open Court with an opportunity to present witnesses and put in his (sic.) where it is sought to collect from him, $15,000.00 in the form of a judgment?

3. Is a Conservator deprived of due process of law and equal protection of law as required by the U.S. Constitution if the Mental Hygiene Law's Section 77.33 is ignored and a removal petition is not referred to the appointing Judge as the statute requires?

4. Can a Court consistent with the due process requirement of the U.S. Constitution ignore the requirement of Sections 77.33 and 77.07 of the Mental Hygiene Law and entertain a petition to remove a Conservator when there is no due proof of service on any living relative of the Conservatee, and when there are living relative (sic.) in existence?

It will thus be obseved that Appellant did not question the validity of Section 77.33 or claim that the statute was repugnant to the Constitution of the United States, his claim being that the Section was ignored in the state courts. Only at this late date in his jurisdictional statement in this Court (p. i) does Appellant seek to convert his claim that the state courts ignored the requirements of the statute to a claim of constitutional deficiencies in the statute.

The law of New York requires that constitutional questions be raised in the trial court and, if not, they will not be considered on appeal. Moreover, if a

question is raised as to the constitutionality of a statute, the attorney general of the State must be served with notice and it is the duty of the attorney general to appear in support of the constitutionality of the statute. Section 71, New York Executive Law. No such notice was served in connection with any of the proceedings in the state courts herein. Nor was there any appearance by the attorney general in any of such proceedings. Similarly, see Rule 28.4(c) of the Rules of this Court and 28 U.S.C., Section 2403 (b).

None of the opinions of the state courts mention, discuss or pass upon any constitutional questions.

This Court has consistently ruled that before its jurisdiction can be invoked on appeal from a state court, it must appear that the Federal questions involved were properly raised in the State courts at the proper time, as is reflected in Rule 16. Appellant's attempt to raise the question of the constitutionality of the statute for the first time on an appeal to this Court is inappropriate and ineffective to invoke the jurisdiction of this Court.

III. The Appeal Fails to Present a Substantial Federal Question

Appellee respectfully submits that Federal constitutional questions may not be presented to this Court unless the precise questions have been placed in issue before the state courts and passed upon by such courts. This basic procedural and statutory requirement is totally absent in the case at bar.

This case is one of a simple special proceeding pursuant to the Mental Hygiene Law wherein the Conservator who was appointed by the court pursuant to the statute was subsequently removed by the court pursuant to the same statute when the existence of a conflict of interest came to light and was brought to the court's attention. The proceeding did not rise to the level of involvement of the Seventh or Fourteenth Amendments of the United States Constitution, but was concerned principally with issues of fact and the application of the state statute to the facts.

Despite Appellant's professed concern about conservatorship proceedings having grown to "immense

proportions" in New York affecting "fundamental rights guaranteed by the U.S. constitution" and this case standing as a precedent to be cited by "any venturesome predator" (Appellant's page 8), this Court should not need to be assured that the laws of the State of New York dealing with conservatorship are being properly policed and enforced by the appropriate authorities, including Referees, as is evidenced by the order removing the Conservator in this case.

IV. Appellant's Jurisdictional Statement Does Not Comply With Rule 15 and Rule 28.4(c).

Appellant's jurisdictional statement is not only replete with untrue statements of facts, but in many other respects fails to comply with Rule 15. For example, subdivision .1(g) requires a concise statement of the case. Appellant's statement improperly and without relevancy to the resolution of any constitutional questions or other issues drags in "a Genovese crime family 'soldier'" (p. i),

completely irrelevant and scandalous material dealing with various present and former court officials (pp. 4,5), a wholly unrelated case involving "aged Anna Richter" (p. 5) and even the totally unrelated matter involving John Zaccaro in the case of Conservatee Alice Phelan (p. 6). The climax of Appellant's argument, however, is where Appellant's statement accuses Appellee of having "helped bring the Mafia into the Conservatee's life" (p. 8) which is no more than a figment of Appellant's febrile imagination and so far from the truth that it is incredible that Appellant's statement to this Court includes this false and malicious charge.

Moreoever, a close examination of Appellant's Appendix and comparison of the papers in the state courts there allegedly reproduced discloses that of the 32 pages of Appendix no more than 3 pages are fully and accurately reproduced.

Further, the jurisdictional statement fails to comply with Rule 28.4 (c) in that it does not recite that 28 U.S.C. Sec. 2403 (b) may be applicable. Apparently the

jurisdictional statement was not served on the Attorney General of the State of New York.

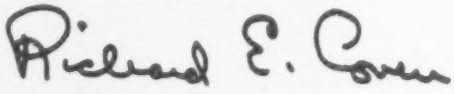
Lastly, Appellant's jurisdictional statement fails to specify the stage in the proceedings at which the questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed upon by the courts, all as required by subdivision .1(g) of Rule 15. There has been a complete failure to comply with these requirements because it is impossible to do so, such questions never having been raised in the state courts.

CONCLUSION

For all of the foregoing, Appellee respectfully moves that this appeal be dismissed and that this Court grant to Appellee the costs on this appeal and such other

and further relief including, because of Appellant's improper notice of appeal and jurisdictional statement, such sanctions or damages pursuant to Rule 49.2 of the Rules of this Court as it may deem appropriate.

Respectfully submitted,



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Supreme Court, U.S.
FILED
SEP 26 1987
JOSEPH F. SPANIOL, JR.

No. 87-2040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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ON APPEAL FROM THE APPELLATE DIVISION OF
THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLANT'S REPLY TO DISMISSAL MOTION

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SUPREME COURT OF THE UNITED STATES

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Appellant.

APPELLANT'S REPLY

Orders entered on Referee's reports, like the Order being appealed, are not reviewable beyond the N Y Supreme Court's Appellate Division. Gray v Fisk 53 N Y 630.

Respectfully submitted
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212-MU 7-0890